

MARCH / APRIL 2013

# INSIDE *ALEC*

A PUBLICATION OF THE AMERICAN LEGISLATIVE EXCHANGE COUNCIL

**SPECIAL FOCUS:**

**TAX & COMMERCE**

**Best Practices for Protecting Taxpayers**

DR. BARRY W. POULSON

**Technology Limits Government Spending**

THE HONORABLE JASON SAINTE, NC (HD-97)

**Travel Service Taxes**

THE HONORABLE JASON BRODEUR, FL (HD-28)



A banner image showing a city skyline with several skyscrapers under a clear blue sky. A tall, thin blue skyscraper is prominent on the left. In the foreground, there are green trees and a street lamp.

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Oklahoma City, OK

Don't miss the American Legislative Exchange Council Spring Task Force Summit on May 2-3, in the heart of Oklahoma City, OK. Attendees of the Summit will have the opportunity to advance federalism and individual liberty within the states while enjoying networking opportunities with legislators from around the country.

The 2013 Spring Task Force Summit is an excellent opportunity for public and private sector members to address challenges facing all Americans. During the meeting, legislators will introduce and debate potential model policies that will have a positive impact on the American economy including issues related to state tax reform, school choice programs, and cybersecurity.

The 2013 Spring Task Force Summit will set the tone for the rest of the year. If you are interested in becoming a Task Force member, please contact your state chair. We encourage you to register for the Summit at: [www.alec.org/stfs](http://www.alec.org/stfs).

Date	Time	Event
2-May	5:00pm - 8:00pm	Subcommittee Meetings (Check with your Task Force Director)
2-May	9:00pm - 11:00pm	Hospitality Suite
3-May	8:00am-9:15am	Plenary Breakfast with Governor Mary Fallin
3-May	9:30am-10:45am	Subcommittee Meetings
3-May	11:00am-12:15pm	Energy and Education Workshops
3-May	12:30pm-1:30pm	Task Force Luncheons
3-May	2:00pm-5:00pm	Task Force Meetings
3-May	6:00pm-8:00pm	Oklahoma Reception



LEADERSHIP

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# LEADERSHIP PROFILES



Chairman Profile:

**The Honorable Ken Weyler  
New Hampshire (HD-8)**

Chairman of the Council Task Force on  
Tax and Fiscal Policy

Following the highly successful task force chairmanship of Indiana Senator, Jim Buck (SD-21), the American Legislative Exchange Council is pleased to announce the selection of New Hampshire Representative Ken Weyler (HD-8) as the 2013-2014 chairman of the Council Task Force on Tax and Fiscal Policy. A retired American Airlines pilot, Weyler brings more than 15 years of experience serving on the New Hampshire House Finance Committee and the Council Task Force on Tax and Fiscal Policy. As Rep. Weyler explains, “the Task Force has been the best experience in learning about other states’ methods in Tax Expenditure Limitations, such as the Taxpayers’ Bill of Rights, and exchanging ideas with other legislators about budgeting. Guest Scholars, like Professor Richard Vedder of Ohio University, have educated us with applicable facts and ideas. I have learned many valuable concepts that have been used to increase accountability and efficiency back home.”

Weyler is a legislator who embodies the state’s “live free or die” motto. After fighting for greater budget effectiveness and sound tax policy, he describes how the Council’s research has been influential in the legislature. “The *Rich States, Poor States* series by Jonathan Williams, Dr. Arthur Laffer and Stephen Moore has been an eye-opener for me and my colleagues in discovering the impact of fiscal policy. *The Budget Reform Toolkit* was also a very popular publication in my legislature.”

Members of the Task Force on Tax and Fiscal Policy are sure to benefit from Rep. Weyler’s experience and his commitment to the Council’s limited government principles.



Chairman Profile:

**The Honorable Dawn Pettengill  
Iowa (HD-39)**

Chairman of the Council Task Force on  
Commerce, Insurance and Economic  
Development

The American Legislative Exchange Council is pleased to announce Iowa Representative Dawn Pettengill (HD-39) as the incoming chair of the Council Task Force on Commerce, Insurance and Economic Development. Former mayor and city councilwoman of Mt. Auburn, Iowa, Representative Pettengill will bring to the Task Force over nine years of experience in the Iowa Legislature and the Iowa House Commerce Committee.

The Task Force has already benefited from Representative Pettengill’s leadership as the public sector chair of the Labor and Business Regulation Subcommittee. Representative Pettengill explains, “The Task Force has served as a great means of exchanging policy ideas and learning what other states have done to advance the principles of free markets and limited government. Guest speakers and panelists give attendees evidence-based ideas on how to enhance competition, promote employment and limit government regulation.”

Representative Pettengill’s experience and commitment to free market principles will certainly benefit the members of the Task Force on Commerce, Insurance and Economic Development.

# A Plea For Fiscal Preparedness

BY THE HONORABLES WAYNE NIEDERHAUSER, REBECCA LOCKHART, RICHARD ELLIS & JOHN DOUGALL

**T**ogether, we issue a plea for fiscal responsibility in an era of federal irresponsibility. We call on individuals and business and civic leaders to join us in preparing our families, businesses and communities to lead out as a model to the nation dealing with what has been called the most predictable economic crisis in history.

According to the most recent report of the Government Accountability Office and the Comptroller General of the United States, "The comprehensive long-term fiscal projections show that—absent policy changes—the federal government continues to face an unsustainable fiscal path." While Utah is widely recognized as being the best managed State in the Nation, during fiscal year 2010, 45.3 percent of Utah's spending was comprised of federal funds.

When necessary and painful changes are inevitably made at the federal level, the amount of federal funding available to our state, communities and citizens must decline, in some cases, substantially. Pending cuts from the federal Budget Control Act of 2011, under which 8-9 percent of federal discretionary spending in Utah and 9-10 percent of military spending are slated to be cut, still leave massive federal deficits in place. We anticipate that further cuts of federal funds to state and local governments must unavoidably follow.

Utahns know how to prepare for and deal with crisis better than anyone! We invite everyone, young and old alike, to join us in establishing and implementing the Financial Ready Utah initiative to help Utahns

prepare for the financial challenges that lie ahead. We urge you to visit [FinancialReadyUtah.com](http://FinancialReadyUtah.com) to find additional resources and specific actions you can take.

During this Legislative session, a team of Legislators has prepared a package of bills that will lay the groundwork for preparing our state, our communities and our families to address these challenges including legislation which establishes a Federal Funds Review Commission to evaluate the risks and implements comprehensive planning measures to address these challenges.

We have an obligation to our children and our grandchildren to make sure that we do not leave a legacy of selfishness and entitlement. We need to model the behaviors we say we value—thrift, hard work, generosity of spirit and true community care. Sometimes when problems are so enormous, like the current federal debt situation, we feel frozen. But each of us can start today by not spending beyond our means, getting out of debt, putting away savings or supplies for a rainy day and asking our political leaders to do the same! We can start today by holding elected officials accountable for their stewardship of taxpayer funds.

We encourage you to get involved! Mobilize your communities, including your cities, counties, chambers of commerce and other organizations to adopt a Resolution supporting the Financial Ready Utah efforts. Such resolutions leverage everyone's commitment and support to lead our nation in preparing for the coming financial turmoil as the federal government right-sizes its spending.

Join us, to become Financial Ready, Utah! 

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**SENATOR WAYNE NIEDERHAUSER, UT (SD-9)** is the president of the Utah State Senate.

**REPRESENTATIVE REBECCA LOCKHART, UT (HD-64)** is the Speaker of the Utah House of Representatives.

**MR. RICHARD ELLIS** is the Utah State Treasurer.

**MR. JOHN DOUGALL** is the Utah State Auditor.

# Best Practices for Protecting Taxpayers

BY DR. BARRY W. POULSON

**G**enerally, legislation to increase taxes requires approval by a majority vote in each house of a state legislature. Some states, however, require a supermajority vote of each house of the state legislature to pass new taxes or increase existing ones.

Currently, 17 states have a supermajority vote requirement for higher taxes (see Table 1). Arkansas was the first state to enact this requirement in 1934. Nine of the 16 states with supermajority requirements enacted those requirements in the 1990s. In 2011, Wisconsin became the 17th state to enact the requirement for a supermajority vote to raise taxes.

In six states, the supermajority vote requirement was enacted through citizen initiative, and 10 states used the referendum process. In Washington and Wisconsin, the supermajority vote requirement was enacted as a statutory measure; in all the other states the measures are incorporated in their constitution. Supermajority vote requirements in a state's constitution have the potential to be more binding than those enacted statutorily.

Colorado is unique in that the Taxpayer Bill of Rights (TABOR) Amendment also requires majority voter approval of citizens to raise taxes or issue debt.<sup>1</sup> The Wisconsin law requiring a supermajority vote of the state legislature does not apply if the legislature passes a joint resolution requiring a statewide referendum on the tax hike in question and a majority of voters on the referendum approve the increase.<sup>2</sup> In Missouri, a tax increase exceeding the revenue limit—a constitutional revenue limit tied to the growth in personal income—must first receive a declaration of emergency by two-thirds of the members of the legislature.<sup>3</sup>

State supermajority tax vote requirements require a three-fifths, two-thirds or three-quarters majority vote in both chambers of the legislature to pass tax increases or raise new taxes. Four states have a three-fifths requirement; ten states have a two-thirds requirement; and three states have a three-quarters requirement. Most states apply the supermajority vote requirement to all taxes. However, Florida and Michigan apply it only to the corporate income tax and state property tax, respectively.<sup>4</sup> In Arkansas, sales taxes are exempt from the supermajority requirement.<sup>5</sup>

**Table 1: Legislative Supermajority Vote Requirements to Raise Taxes, by State**

State	Year Adopted	Initiative or Referendum	Supermajority Vote Required	Taxes Subject to Supermajority Vote Requirement
Arizona	1992	I	2/3	All
Arkansas	1934	R	3/4	All Except Sales
California	1979	I	2/3	All
Colorado	1992	I	2/3	All
Delaware	1980	R	3/5	All
Florida	1871	R	2/3	Corporate Income
Kentucky	2000	R	3/5	All
Louisiana	1966	R	2/3	All
Michigan	1994	R	3/4	State Property
Mississippi	1970	R	3/5	All
Missouri	1996	R	2/3	All
Nevada	1996	I	2/3	All
Oklahoma	1992	I	3/4	All
Oregon	1996	R	3/5	All
South Dakota	1996	R	2/3	All
Washington	1993	I	2/3	All
Wisconsin	2011	Statutory	2/3	All

Source: Compiled by the author from state budget offices and also from data compiled by Jason Mercier from the Washington Policy Center.

Legislation to enact a new supermajority vote requirement has been introduced in several other states in recent years. In 2011, the North Dakota Legislature introduced a constitutional amendment requiring a 60 percent vote by each legislative chamber to increase the state's sales, income, use and motor vehicle taxes. That measure failed in the house.<sup>6</sup> In November 2012, Washington voters decisively approved Initiative 1185, a constitutional amendment requiring a two-thirds vote of the Legislature to raise taxes.<sup>7</sup>

The supermajority vote requirement is designed to limit the growth of state revenue by constraining the ability of legislators to raise taxes. As Nobel Memorial Prize-winning economist James Buchanan and economist Gordon Tullock argue, a supermajority vote requirement alters the lawmaking process by increasing the cost of decision-making.<sup>8</sup> Since more negotiation and compromise is required, it is more difficult to increase taxes, and tyranny by a majority is avoided.

In periods of recession and revenue shortfall, states usually rely on a combination of tax increases and spending cuts to balance their budgets.<sup>9</sup> To the extent that a supermajority vote requirement limits the ability of a legislature to raise taxes, it is forced to rely on spending cuts. In the long run, a supermajority vote requirement can constrain the ratcheting up of taxes, revenue and spending from one business cycle to the next.<sup>10</sup>


A supermajority vote requirement is often referred to as a tax limitation rule, but should be distinguished from a tax and expenditure limit (TEL). A TEL imposes a limit on state revenue and/or expenditures, as well as taxes. The TEL limit may be based on a measure of state spending or linked to some measure of aggregate economic activity, such as state income. In five states, a TEL limit is linked to the growth in population and inflation, a more stringent constraint on revenue and spending.<sup>11</sup>

A number of scholars have analyzed the effectiveness of supermajority vote requirements.<sup>12</sup> While most studies find that supermajority vote requirements significantly slow the growth in taxes and state revenue, the evidence is mixed. In this sense the literature on supermajority vote requirements is similar to that on TELs, which are sometimes, but not always, found to constrain the growth of state revenues and spending.<sup>13</sup>

Recent studies, however, find that when TELs are stringently designed and implemented, they significantly reduce the growth in state revenue and spending.<sup>14</sup> Some states have enacted weak TELs by excluding some portion of revenue or expenditure from the limit; in other cases, the TELs

include waivers to exceed the limit. Statutory TELs tend to be less effective than TELs incorporated in a state constitution because legislators can easily ignore or suspend a statutory TEL. When the TEL is linked to inflation and population growth, as in Colorado, it is more effective.<sup>15</sup> On the other hand, TELs linked to income growth, as in Florida and Michigan, are often ineffective.<sup>16</sup>

Perhaps the most important shortcoming in this literature on supermajority vote requirements and TELs is the failure to understand the relationship between fiscal discipline rules.<sup>17</sup> The experience in Colorado reveals the nature of this flaw. Colorado's TABOR amendment is the most effective tax and spending limit in the country. One of the most important provisions in TABOR is the requirement for majority-vote approval of citizens for any increase in taxes or debt. Over the past two decades, this voting requirement has proven to be a very effective constraint on the ability to raise taxes, especially at the state level. While Colorado has a supermajority requirement for the legislature to propose tax increases, it is the requirement for voter approval that most limits state increases in taxes and revenue. The Colorado Legislature could propose an emergency tax increase with a two-thirds majority vote, but to become a permanent tax increase the measure would also require a majority vote of the citizens. As a result, bills proposing emergency tax increases are rarely introduced, and have yet to receive the requisite two-thirds majority vote of the legislature.

Thus, in states like Colorado with a stringent TEL we should not expect that a supermajority vote requirement to raise taxes will be very significant. However, in states with a weak TEL the proposed supermajority vote requirement to raise taxes is likely to be more significant. A supermajority vote requirement is not a magic bullet, but it does require legislators to achieve a broader consensus before raising taxes. 



**DR. BARRY W. POULSON** is Professor Emeritus of Economics from the University of Colorado at Boulder. He is also an advisor of the American Legislative Exchange Council's Task Force on Tax and Fiscal Policy.

1 Barry W. Poulson, *Tax and Spending Limits: Theory Analysis and Policy*, Issue Paper 2-2004, Independence Institute, Golden Colorado, January 31, 2004.

2 2011-2012 Wisconsin Legislature, January 2011 Special Session Assembly Bill 5. <http://docs.legis.wisconsin.gov/2011/proposals/jrl/AB5>

3 Article X, Sections 16-24 of the Missouri Constitution.

4 Article 9, Section 3 of the Michigan Constitution. Article 7, section 5(b) of the Florida Constitution.

5 Amendment 19 of the Arkansas Constitution.

6 North Dakota State Legislature, 2011 Legislation Information, House Concurrent Resolution 3023.

7 Washington State Legislature, January 2011 Special Session, Assembly Bill 5; and Jason Mercier, "Tax Restrictions Across the Country," Washington Policy Center, August 7, 2012.

8 The idea that tax increases should require more than a simple majority vote of a representative body has a long history in the public choice literature. See for example James Buchanan, and Gordon Tullock. *The Calculus of Consent*, Ann Arbor: University of Michigan Press, 1962.

9 Brian Knight. 2000. "Supermajority Voting Requirements for Tax Increases: Evidence from the States," *Journal of Public Economics* 76 41-67.

10 Ibid.

11 For a discussion of tax and expenditure limits see John Merrifield and Barry W. Poulson, "State Fiscal Policies for Budget Stabilization and Economic Growth: A Dynamic Scoring Analysis," paper prepared for the Southern Economic Association meetings November 16-18, New Orleans, 2012.

12 Op. Cit. Brian Knight. 2000. "Supermajority Voting Requirements for Tax Increases: Evidence from the States," *Journal of Public Economics* 76 41-67; Allison McCarthy and Elaine Magg. 2006. "Limits on State Revenue," Tax Policy Center <http://taxpolicycenter.org/publication/template.cfm?PubID=9839>; Juliet Musso, Elizabeth Graddy, and Jennifer Grizard. 2006. "State Budgetary Processes and Reforms: The California Story," *Public Budgeting and Finance* 26: 1-21; Timothy Beasley and Anne Case. 2003. "Political Institutions and Policy Choices: Evidence from the United States," *Journal of Economic Literature* 41: 7-73.

13 Op. Cit. Merrifield and Poulson.

14 Op. Cit. Merrifield and Poulson

15 Ibid.

16 Barry W. Poulson, *The Case for Florida to Enact a Taxpayer Protection Amendment*, Background Number 54, The James Madison Institute, December 2007.

17 Ibid.



# Who's Winning the Pension Wars?

BY RICK DREYFUSS

**W**hile most private corporations moved to defined contribution (DC) pension plans decades ago, defined benefit (DB) plans remain common throughout the public sector. In pension reform debates, DB plans are often defended as cheaper to administer, thus offering taxpayers “more bang for the buck.” The National Institute on Retirement Security has estimated that DB plans can provide the same level of retirement income at nearly half the cost of a DC plan.

This claim is misleading. DC plans are not inherently more expensive to administer than DB plans. Arguments that they are, by the NIRS and others, are typically based on two flawed assumptions.

First, DB advocates assume that DC plans are less professionally managed than DB plans. This is the old wisdom. When 401(k) plans were first introduced there was often an absence of diversified fund options and little investment guidance provided to participants. In those days, the default investment option was frequently a stable-value fund providing a fixed rate of return. For a variety of reasons, many early 401(k) fund managers did not properly diversify and consequently invested up to 100 percent of their assets in this low-risk/low-return option. Such returns were often the basis of comparison against properly diversified DB portfolios.

But markets change in response to consumer needs. As evidence of this, target-date funds based upon the participant's assumed year of retirement have emerged and in many cases represent the default 401(k) investment option. These funds are diversified and the asset composition of the fund automatically changes as the participant approaches retirement. For others the preferred option is to participate in several “professionally managed” funds using the guidance of financial planning resources readily accessible to members.

In contrast, many DB plans need to achieve long-term investment annual return assumptions in the 7.5 percent range. This often leads them to take on excessive investment risks with high expenses, whereas many top-rated DC firms including Vanguard and Fidelity have capably managed 401(k) assets in a low-cost, competitive environment for years.


Second, DB plans are said to be more efficient since DC participants must “over-save” to ensure they do not outlive their assets. DB plans, by contrast, are designed to provide average payouts for everyone, and thus face no over-saving problem.

But this presumes that DB participants who die early are perfectly content to subsidize longer-living members. Wouldn't most people prefer any unpaid funds to be directed to their surviving family members or a preferred charity rather than a stranger within the retirement plan pool?

DB plans are also said to be more efficient than DC plans because they can invest for indefinite time horizons, which increases returns and lowers costs. But this only works because of a forced intergenerational subsidy from younger employees to older employees. It requires an ongoing inflow of new employees to sustain this arrangement.



Taxpayers rarely realize any of the “savings” that DB plans supposedly provide. The possibility of lower costs is exploited by those looking for a rationale to increase pension benefits. Moreover in 2010, 38 states failed to make their required DB contributions. In the private economy, employer contributions must be made on an ongoing basis into individual accounts.

The reality is DC plans have costs that are current, predictable and can easily be designed to be affordable. More states need to seriously consider joining Michigan and Alaska in enacting a reform that will move new hires into defined contribution retirement plans. 



**RICK DREYFUSS** is a senior fellow at the Manhattan Institute. He has more than two decades of private-sector actuarial experience with the Hershey Co. and is the author of a new report “*Fixing The Public Sector Pension Problem: The (True) Path To Long-Term Reform.*”



# Streamlining Commissions as an Important Tool for Increasing State Competitiveness

BY THE HONORABLE MAURICE P. McTIGUE

**L**awmakers across the country are increasingly focused on making their states more business-friendly than their neighbors and attracting the people, capital and jobs that come with this distinction. Too often, though, they attempt to do so by offering tax breaks, subsidies, and other special privileges as inducements for businesses to pack up and move to their state. Funding this largesse to outsiders means that existing businesses and job creators must pay more than their share in taxes and fees, ultimately leading to a brain drain of the state's talented young people. A far better path would be to focus on improving the state's overall economies so that both new and established businesses can thrive.

In Rhode Island, we saw a clear example of the favoritism strategy over the last few years. In July 2010, the state's Economic Development Corporation offered Studio 38, a video game production company headed by Curt Schilling, a \$75-million loan guarantee to move its production to Providence from Massachusetts. Two years later, the company filed

It is far better to have 1,000 existing firms in your state hire one additional employee than to subsidize an outside firm to come in and hire 1,000 workers.

for bankruptcy, ultimately leaving state taxpayers on the hook for \$112.6 million in moral obligation bonds. This is just the latest and best example of what can happen when states attempt to create a competitive economy by picking winners and losers. For a federal example, look no further than Solyndra, which epitomizes the riskiness of such ventures.

It is far better to have 1,000 existing firms in your state hire one additional employee than to subsidize an outside firm to come in and hire 1,000 workers. The effect of the former is widespread and the entire state economy benefits. Most resident businesses have a track record of succeeding there, while the new entrant often has to be bribed again with taxpayer dollars at the end of their preferential period to stay.


Policymakers can measure their success by looking at job growth and the expansion of state businesses. This stems from private sector investment. So to remain competitive with their neighbors and faraway places, states must provide the friendliest face for investment possible. They can do this by providing a policy environment of certainty, simplicity, and a low cost of tax and regulatory compliance.

Certainty is the most important consideration for investors, so states' fiscal and regulatory habits play an important part in the decisions business leaders make. Future debt is the result of today's spending, and it forces residents and businesses to predict future taxes and spending. In states with large unfunded obligations and high debt levels, they know to expect higher taxes and decreased public services eventually—but how much is anyone's guess. It is no coincidence that states with the highest levels of debt per capita have been losing residents to states with smaller government, lower tax rates and policy certainty.

Illinois provides an example of how states can easily fall behind. In a five-year period it dropped from 8th to 48th in CEO Magazine's ranking of the Best and Worst States for Business. Not an example to follow; the state now has the nation's lowest bond rating, reflecting its dismal prospects for economic growth.

For state legislators and governors seeking to improve their competitive standing, appointing a streamlining commission is an important tool. Including experts from outside of government is a critical step in the process. In particular, streamlining commissions that include members of the private sector can offer insights into improved managerial practices for government organizations. And they provide invaluable advice on creating a better climate for investors by identifying key barriers to investment like compliance costs and regulatory hurdles.

For example, Colorado's Department of Regulatory Agencies brought together the "Pits and Peeves" Roundtable Initiative, a group of dozens of business leaders with the objective of improving customer service from the state's agencies. The initiative provided the agencies with the opportunity to listen to their customers and identify the ways in which they could simplify the regulatory process. Similarly, Virginia's Commission on Government Reform and Restructuring identified four professions which could be deregulated, making it easier for residents to do business without the time and expenses of too much occupational licensing.

Improving competitiveness is a continuous cycle; to stand still and do nothing means moving backwards in the rankings. Decisions that are unfriendly to investment will move capital and jobs to other states or even to other countries, and proactive lawmakers must be aware that they are competing in a global market. Ultimately, policymakers in struggling states will know they have created a truly competitive economy when the educated kids who have left to pursue opportunities elsewhere start returning home to work. 



**THE HONORABLE MAURICE P. MCTIGUE, QSO**, is vice president for outreach at the Mercatus Center at George Mason University. He is a former cabinet minister and member of parliament in his native New Zealand.

# Tax Myths Debunked

BY DR. RANDALL POZDENA AND DR. ERIC FRUITS

It is taken as an article of faith today that the cure for recession or slow growth is to increase government spending—even if that requires issuing debt and increasing tax rates. Indeed, we were told by the President’s economic advisors in 2009 that their deficit spending plan would cause the unemployment rate to peak at less than 8 percent, and decline quickly to less than 6 percent by 2012. Instead, of course, unemployment jumped to 10 percent by 2010 and remains stubbornly near 8 percent today.

The failure of the Obama stimulus plan came as no surprise to those of us who have not drunk the long-discarded Keynesian Kool-Aid. After all, if the government spends more, then someone else has to do with less—now or in the future—thereby impeding economic activity and delaying recovery. Unfortunately, the unquestioned faith in the Keynesian spending cure is just one example of many popularly held misconceptions about economic policy that are prevalent in today’s culture. As debates rage on in Washington and throughout the states about tax and economic policy, there is an abundance of misrepresentations and misconceptions that are regularly accepted as fact.


With the help of the American Legislative Exchange Council, we authored *Tax Myths Debunked*. It is an attempt to set the record straight on the facts surrounding the tax and fiscal policies that have been pushed by a progressive agenda. Our report discusses seven popularly held misconceptions about tax and fiscal policy that are misleading policy makers and the public, and will lead to harmful decisions. From the myth that raising taxes on the rich will not harm the economy, to the fallacy that austerity in the form of spending cuts will necessarily harm growth and employment, we have documented the academic studies and empirical data that refute these claims. Our goal is to balance the debate by demonstrating the strength of the evidence against the commonly-accepted wisdom regarding certain key issues. Readers will see that the strength of the evidence demonstrates that the key to economic growth is in free markets, contained government spending, and low tax rates.

*Tax Myths Debunked* also includes an examination of *Rich States, Poor States*, the state economic competitiveness index that is published yearly by the Council. This report seems to strike a nerve with progressives who have a stake in limiting the right to work, being given the authority to redistribute income, and building public sector empires at the expense of economic growth. Taxes matter to economic growth, and *Rich States, Poor States* highlights how this and other economic competitiveness factors drive income, population, and job growth at the state level; there is, indeed, a correlation between a state’s economic performance rank and its competitiveness rank in *Rich States, Poor States*. We found the conclusions of the authors’ reports to have both sound theoretical and empirical bases.

In researching these studies, we also encountered critiques to this type of research from the proponents of larger government on the political Left. It was surprising to us that the critiques from groups such as the Center for Budget and Policy Priorities demonstrated so little



awareness of the most relevant threads of the professional literature including authoritative studies by the Organisation for Economic Cooperation and Development, International Monetary Fund and others. The studies also demonstrate serious inaccuracies—confusing improvements in one industry’s share of the economy with overall economic growth, for example, and consistently failing to use appropriate statistical methods. For those who care more about analysis than ideology, we have incorporated more than 100 citations to the professional literature in *Tax Myths Debunked* to buttress our views.

We hope that *Tax Myths Debunked* serves to introduce some healthy skepticism about accepting the common misconceptions about tax and fiscal policy that pervade the current political discussion. The publication can then serve as a resource for policymakers and interested individuals when discussing the options for how to best achieve a fast growing economy. 



**DR. RANDALL POZDENA** is President of QuantEcon Inc. and is a former Research Vice-President at the San Francisco Federal Reserve Bank. **DR. ERIC FRUITS** is an adjunct professor of economics and business at Portland State University.

**Download your free copy of *Tax Myths Debunked* at:**  
**[alec.org/publications/tax-myths-debunked](http://alec.org/publications/tax-myths-debunked)**

# A Legislator's Guide to Defusing the Pension Bomb

BY THE HONORABLE DAN LILJENQUIST

**T**he latest publication from ALEC's Center for State Fiscal Reform tackles one of the greatest threats to state finances – unfunded pension systems for government workers. *A Legislator's Guide to Defusing the Pension Bomb* provides several tools for legislators to ensure that the state's government can affordably fund state and local pensions, while protecting taxpayers.

State governments face many problems, including stagnant school performance, soaring Medicaid budgets and gridlock on urban roads. Their ability to fund improvements to services is challenged by a topic that seldom sees the light of day: pensions for state and local government workers. In most situations, retired public sector employees have a legal right to their pension checks. Ironically, they have no guarantee during their working years that legislators will put away enough money to pay for those checks. The sad fact is political calculations give legislators

Political calculations give legislators strong incentives to promise generous benefits and few, if any, incentives to make good on those promises.

strong incentives to promise generous benefits and few, if any, incentives to make good on those promises. "Unfunded liabilities" is the term used to describe the promises that legislatures have made, but cannot keep. Estimating the size of those pension liabilities is a difficult task, but the liabilities range somewhere from \$750 billion to more than \$4 trillion—enough to cover a \$60,000 salary and benefits package for 625,000 to 1.2 million new elementary school teachers for 20 years.

Employers in the private sector have moved most of their employees from the defined-benefit model that dominates public employment to other designs. Most notable are "defined contribution" and "cash balance" plans. Though these two types of plans differ from each other and come in many versions, they share a fundamental difference from the defined-benefit plan: They offer increased predictability for the employer and an increased likelihood to the employee that the money promised to them will actually be put away in their name.


As overseers of both the public treasury and the public workforce, legislators, regardless of ideological stripe or policy goals, need to review the health of government pensions in their states. In many cases, they will need to look for both short-term patches and long-term cures. Before



looking in the toolbox, though, they should establish some principles for reform. These should include: removing the possibility that the state will go functionally bankrupt due to pension-related costs, meeting the obligations the state has incurred in the past, and making future obligations predictable and sustainable.

Once they establish principles for reform, legislators can choose from a menu of options. Tinkering with existing plans is the most obvious, and sometimes the easiest. Some of these steps include raising the retirement age, eliminating the practice of an employee obligating the employer for decades worth of pension payments through one year of cashing in sick leave, and making cost-of-living adjustment (COLA) payments contingent on the financial health of the pension plan. Rhode Island is the most notable example of a state that has taken this path.

Often these "inside-the-box" changes may not be significant enough to restore financial health to a pension plan. Worse yet, they do not remove the threat of functional bankruptcy. Legislators should move defined-benefit systems to properly designed alternatives, such as defined-contribution, cash balance, and hybrid plans. Several states have moved in these directions, including Michigan (defined contribution), Kansas (cash balance) and Utah (hybrid).

Reformers must listen to a wide range of people and treat them with respect, and stress math rather than ideology. Let me be clear, the pension problems facing states are not political, but mathematical in nature. Solving the problem will require bipartisan solutions that are based in financial reality. *A Legislator's Guide to Defusing the Pension Bomb* provides policymakers with sound ideas to further fundamental reform. 



**DAN LILJENQUIST** is a former Utah State Senator who is nationally recognized for his work on retirement reform. He is the founder and president of Liljenquist Strategies.



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# Gasoline Taxes: Funding Roads or Pork?

BY JONATHAN WILLIAMS

According to the American Petroleum Institute, federal, state, and local taxes average 48.8 cents per gallon of unleaded gasoline and 54.4 cents per gallon of diesel. As drivers face that burden each time they fill up at the pump, it is necessary for lawmakers to show that these funds are being used prudently.

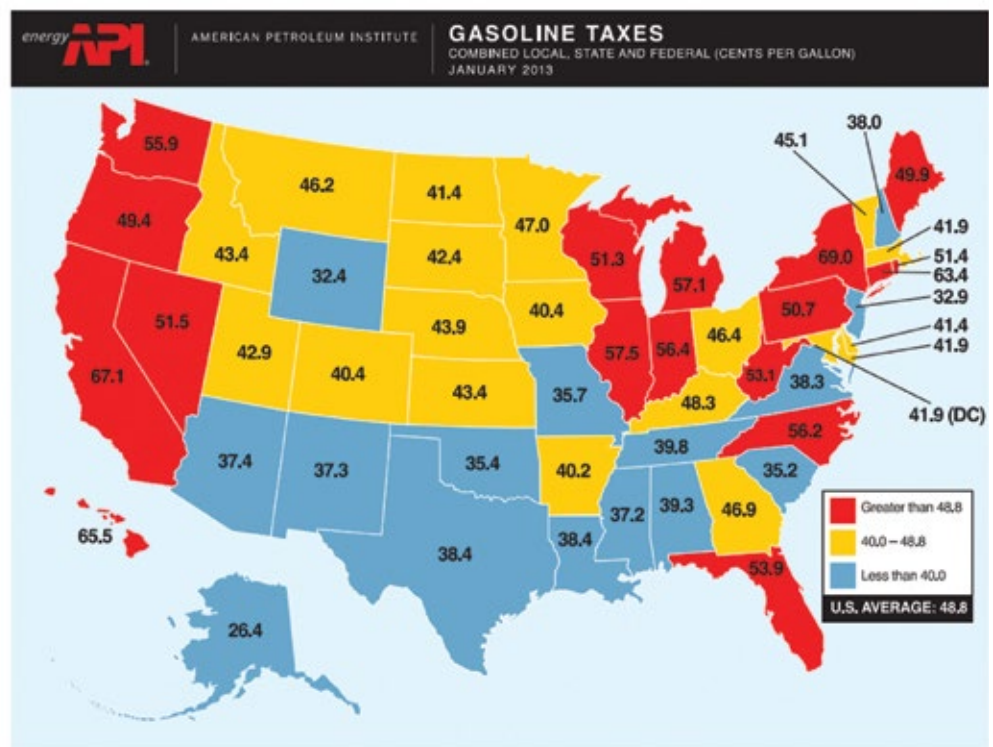
For the past 100 years, American motorists have been enamored with better roadways, and the benefits of increased personal mobility cannot be overstated. Gasoline taxes provided the vast majority of funding required to bring the United States into the automobile age and to build the interstate highway system. For generations, Americans thought of gasoline taxes as the price of mobility in America; however, with increasing mismanagement of gasoline tax funds at the state and federal level, drivers no longer see the connection between gasoline taxes at the pump and spending to build and maintain transportation infrastructure.

Gasoline taxes in America were levied upon the premise that they would serve as a user fee for roads. If the benefit principle is to work, governments must ensure gasoline tax dollars are spent to build and maintain roads for the benefit of users who pay the gasoline tax.

Unfortunately, gasoline taxes have unquestionably departed from their historical justification, rooted in the benefit principle of taxation. The Council's Task Force on Tax and Fiscal Policy adopted model language to correct this problem (see "A Constitutional Amendment Restricting the Use of Vehicle Fees and Taxes for Highway Purposes"). According to previous research, at least 20 states divert gasoline tax revenue to fund numerous general fund projects. In addition, state gasoline tax revenue, which could have been used for road construction and maintenance, has been instead used for the following:

- Administration of mobile home titling,
- Aid to public schools,
- Improvement of recreational snowmobiling,
- Eradication of the fruit fly and other emergencies,
- Recreational boating activities, freshwater fisheries management and research,
- Boating and boating facilities, seafood and salt water sports fishing, and
- Conservation activities to prevent or reduce soil, wildlife and habitat loss.

Gasoline taxes in America were levied upon the premise that they would serve as a user fee for roads.



The recent acceleration away from the benefit principle is detrimental to sound tax policy, quality public roads and the overall integrity of government "trust funds." If benefit-principle taxation is to survive as the foremost source of road funding, lawmakers must insist on more oversight to ensure revenue from gasoline tax user fees do not support bridges to nowhere or attempts to eradicate the fruit fly. Instead, these user fees should be used to build the roads of the 21st century and to provide a fair and equitable transportation system for all American motorists.

For additional information, please see "Paying at the Pump: Gasoline Taxes in America" [www.taxfoundation.org](http://www.taxfoundation.org)



**JONATHAN WILLIAMS** is director of the Council's Task Force on Tax and Fiscal Policy, as well as the Center for State Fiscal Reform.

## The Nine States with the Lowest and the Highest Marginal Personal Income Tax (PIT) Rate Economic Performance (performance between 2001 and 2010 unless otherwise noted)

State	Top PIT Rate*	Gross State Product Growth	Non-Farm Payroll Employment Growth	Population Growth
Alaska	0.00%	77.0%	12.2%	12.1%
Florida	0.00%	47.7%	0.2%	15.0%
Nevada	0.00%	58.9%	6.1%	28.9%
New Hampshire	0.00%	35.2%	-0.7%	4.7%
South Dakota	0.00%	58.5%	6.4%	7.3%
Tennessee	0.00%	38.6%	-2.8%	10.3%
Texas	0.00%	57.7%	8.7%	17.9%
Washington	0.00%	47.8%	3.0%	12.3%
Wyoming	0.00%	105.6%	15.2%	14.3%
<b>9 States with no PIT**</b>	<b>0.00%</b>	<b>58.54% ▲</b>	<b>5.36% ▲</b>	<b>13.65% ▲</b>
<b>U.S. Average**</b>	<b>5.70%</b>	<b>46.61%</b>	<b>0.51%</b>	<b>8.63%</b>
<b>9 States with Highest Marginal PIT Rate**</b>	<b>9.90%</b>	<b>42.06% ▼</b>	<b>-1.68% ▼</b>	<b>5.49% ▼</b>
Ohio	8.43%	24.8%	-9.3%	1.2%
Maine	8.50%	35.4%	-2.5%	3.4%
Maryland	8.70%	50.9%	1.7%	7.4%
Vermont	8.95%	36.1%	-1.6%	2.2%
New Jersey	9.97%	33.7%	-3.6%	3.6%
California	10.30%	42.1%	-4.8%	8.0%
Oregon	10.59%	55.0%	-0.3%	10.4%
Hawaii	11.00%	57.4%	5.7%	11.7%
New York	12.70%	43.1%	-0.4%	1.5%

\*Highest marginal state and local personal income tax rate imposed as of 1/1/2012 using the tax rate of each state's largest city as a proxy for the local tax. The deductibility of federal taxes from state tax liability is included where applicable. New Hampshire and Tennessee tax some investment forms of income.

\*\*Equal-weighted averages

\*\*\*2000-2009

tes Ten-Year

COMING SOON!

State & Local  
Tax Revenue  
Growth\*\*\*

.....

175.1%

63.6%

74.0%

52.1%

47.2%

43.9%

65.1%

44.0%

168.8%

81.53% ▲

51.04%

44.88% ▼

28.4%

32.6%

47.5%

54.9%

55.1%

41.2%

32.5%

55.8%

56.0%

## Rich States, Poor States 6th Edition

The 2013 release of *Rich States, Poor States* is just around the corner.


*How will your state rank this year?*

Co-authored by renowned economist Dr. Art Laffer, Stephen Moore from *The Wall Street Journal*, and Jonathan Williams, Director of the Council's Center for State Fiscal Reform, *Rich States, Poor States*, highlights which policies help states increase economic growth.

The 6th edition of *Rich States, Poor States* includes the highly anticipated 2013 State Economic Competitiveness Index. The first measure, the Economic Performance Rank, is a historical measure based on a variety of measures, such as a state's absolute domestic migration, and nonfarm payroll employment—each of which is highly influenced by state policy. This ranking details states' individual performances over the past 10 years based on the economic data. The second measure, the Economic Outlook Rank, is a forecast based on a state's current standing in 15 equally weighted policy variables, each of which is influenced directly by state lawmakers through the legislative process.

While readers will have to stay tuned for the official release of the 2013 rankings around tax day, states that rank well on the State Economic Competitiveness Index have the most pro-growth, forward-looking policies in the country. A top ranking in the *Rich States, Poor States* index is associated with higher rates of per-capita income, more non-farm payroll employment growth, lower unemployment rates, and higher rates of growth in GDP per-capita. Overall, states that spend less and tax less experience higher rates of growth than states that tax and spend more.

Readers should look for some interesting trends for the 2013 edition. As state legislators discuss fundamental tax reform this session, misconceptions about good tax policy abound. The authors debunk the latest tax myths that are being promoted by advocates for higher taxes and bigger government. Additionally, striking comparisons between the states with no personal income tax and those with the highest tax burden demonstrate exactly how to grow a state's economy, population, and even tax revenue. *Rich States, Poor States* clearly shows that the key to economic growth is in free-market, pro-growth tax and fiscal policy.

As states are looking for ways to grow their economy, *Rich States, Poor States* is a valuable resource in determining just how a state can prosper. To find out more about *Rich States, Poor States* download your free copy at [www.alec.org/rsp](http://www.alec.org/rsp). 

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## Technology Provides Opportunity to Limit Government Spending

BY THE HONORABLE JASON SAINÉ

**A**s government at all levels struggles to pay bills, two California men were convicted of a fraud scheme aimed to defraud the government of over \$250 million through falsified tax returns.<sup>1</sup> Through their tax preparation company, they charged clients fees as high as \$10,000 in exchange for preparing and filing false tax returns that often sought hundreds of thousands of dollars in refunds.

With each new instance of fraud and abuse in government programs, the tactics and schemes used are increasing in sophistication. Perpetrators often work in organized and expansive fraud networks to exploit these public resources. In just one instance, 111 defendants in nine cities were charged for their participation in fraud schemes involving over \$225 million in false Medicare and Medicaid billings.<sup>2</sup> As federal spending approaches \$4 trillion (\$3.8 in 2013), the opportunity for waste, fraud, and abuse within government abounds and is ever-increasing.

The potential for great public loss is prevalent at both the federal and state level. According to Jim Frogue, editor of *Stop Paying the Crooks* (CHT Press, 2009), "Fraud and abuse are rampant in programs like Medicaid and food stamps. If state policymakers want to solve the problem, they can demand greater transparency in how those programs are run

and utilize the most modern technology to identify and eliminate fraudulent activity in real time."

Modern technologies designed to reduce the losses from fraud, waste, abuse, and improper payments do exist. In fact, they have been deployed successfully in the commercial sector for many years. By implementing an approach that utilizes data from multiple sources and across government agencies, states can increase the detection of inconsistent behaviors such as doctors billing Medicaid for more than 24 hours' worth of appointments in a single day, personal injury attorneys who repeatedly send the same clients to the same doctors for diagnosis, or claims made under two names with the same Social Security number and address.

It is much easier to pinpoint inconsistencies in the data when it is shared across agencies. However, state agencies are often hesitant to share data.

Policymakers can encourage data and information sharing by establishing an Enterprise Fraud Program Office to calculate estimated costs and savings, implement fraud detection technology, and coordinate with state agencies to encourage them to share data and tailor the technology to their particular needs.

*Continued on Page 27*

# Travel Services Taxes: Stepping Over Dollars To Reach For Pennies

BY THE HONORABLE JASON BRODEUR

**W**hile it is correctly said that the states are laboratories of democracy, even the most successful lab can produce bad results. It is hardly a secret that state and municipal governments actively seek new sources of revenue to fund existing programs and to expand their control of commerce. Among the least desirable legislative experiments is a tax proposal that has been considered—and rejected—by more than a dozen states in the past several years: new taxes on travel services.

Travel service taxes take various forms, but generally extend hotel occupancy taxes or state sales taxes to the service fees that travel intermediaries charge to their customers.

This is accomplished through a change in the definition of room rent, which is the cost of sleeping in a hotel for a night, to include any booking fees associated with the reservation. Other bills propose changes in the definition of hotelier or hotel operator to include providers of booking services, including online travel companies like Orbitz and Expedia; tour operators; and travel agents.


These taxes tend to target out-of-state corporations and have profound implications for in-state businesses, such as travel agents, independent hoteliers who often need extra help to market their properties, and other businesses that rely on tourism to survive.

Lawmakers disguise these taxes by characterizing the legislation as a positive source of revenue from outside the state, the establishment of a level playing field, or the identification and closing of a loophole. But there is no loophole, and the system is already fair. Online travel companies and travel agents operate highly successful businesses that market local hotels and attractions to a global customer base. When hotel rooms are full, hotels generate tax revenue—as do out-of-state visitors, who help local economies by spending money on restaurant meals, taxis, souvenirs and tickets to attractions.

Democrat city officials in New York City, the Bay Area, and Washington, D.C. were early proponents of this type of legislation; they saw the chance to impose a politically cost-free tax on visitors and businesses that couldn't retaliate at the ballot box—after all, there's a reason taxes on hotels and rental cars are as high as they are. However, in the past several years, the concept has spread to unexpected places such as Virginia, Tennessee and Utah—not generally fertile ground for tax increases—where even some Republicans have chosen to pursue this legislative concept.

When you tax something more, you get less of it.

Fortunately, every state that considered travel services taxes in 2012 rejected the idea. I'm proud that my home state of Florida recognizes the importance of the tourism industry and has chosen not to go down this dangerous road. Despite pressure from municipal officials looking for new tax revenue for local stadiums and other attractions, state legislators understand these ideas have a detrimental impact on tourism demand and hurt rural communities, small and independent hotels, travel agents, and local small businesses.

The first "Golden Rule of Effective Taxation" in *Rich States, Poor States* puts it best: *When you tax something more, you get less of it.* Applying new taxes on travel services will have a predictable result: it creates a disincentive to promote travel to states that have such taxes. Consumers—and businesses—are savvy enough to find out where it makes sense to spend limited travel budgets. States that steer clear of new taxes on tourism will benefit. 



**REPRESENTATIVE JASON BRODEUR**  
(HD-28) is Chairman of the Florida House subcommittee on Government Operations, and represents Sanford, Florida in the state House of Representatives.



# The Road Less Traveled: Transportation Funding

BY CARA SULLIVAN

In the sequestration talks earlier this year, transportation funding played a large role as policymakers discussed how best to deal with our nation's deteriorating infrastructure. Even in his State of the Union address, President Obama highlighted our nation's crumbling roads. Regardless of one's opinion on the extent of the deterioration of our highway system—a recent analysis conducted by David Hartgen and colleagues found the average condition of highways has actually improved over the past two decades—there is broad consensus that much work needs to be done and a general acknowledgement that creative funding solutions are needed.<sup>1</sup>

The long-standing method of funding highways, the Highway Trust Fund, was established in 1956 as a mechanism for collecting federal fuel taxes to be used exclusively for highway construction and maintenance. Over the years, however, the purview of the Highway Trust Fund has expanded to include local projects such as bike paths, decorative landscaping, and sidewalks. In 2009, 38 percent of federal highway funding was spent on non-highway projects.<sup>2</sup> In addition, as the fuel efficiency of motor vehicles increases, less gas taxes are collected per mile traveled. These factors led to the increasing inability of the Highway Trust Fund to cover its own expenses.

In July 2012, Congress passed MAP-21, the surface transportation reauthorization bill, and transferred \$18.8 billion of general funds to the Highway Trust Fund to help cover the funding gap.<sup>3</sup> Reliance on general funds is not a viable method of paying for our nation's roads and, as budget cuts loom in Washington, similar transfers are less likely. Consequently, states will need to find innovative ways to maintain an adequate level of transportation funding.


In order to meet this need, states are examining various alternatives to fund their transportation projects. So far this year, proposals have ranged from Virginia Governor Bob McDonnell's plan to replace the gas tax with

an increase in the sales tax to considerations of Vehicle Miles Travelled (VMT) taxes in multiple states. These approaches are highly debated but, regardless of which path a state decides to take, there is an essential role for the private sector.

The private sector stands ready to invest in transportation infrastructure and would have more opportunities to do so if focus shifted from funding to financing. Instead of being paid for out of annual budgets, surface transportation projects should be financed so they are paid for over time as users receive benefits. States can do this by enacting public-private partnership enabling legislation.

Public-private partnerships (PPPs) are contractual agreements between public and private sector partners where part of the services that fall under the responsibility of the public entity are provided by the private sector partner. PPPs have the ability to leverage private sector capital, transfer financial risks from taxpayers to the private sector, and more efficiently deliver projects than when the public entity acts alone.

There are successful models of PPPs in Puerto Rico, the United Kingdom, Australia, and British Columbia. Texas implemented wide-ranging policies to authorize private sector financing for state and local assets and Virginia has employed PPPs to construct projects such as the Midtown Tunnel.

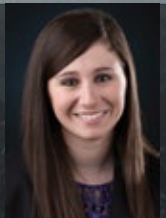
PPPs are not the entire solution but they provide an important way for states to infuse private sector dollars into their transportation projects as the federal government and Highway Trust Fund become less likely sources of funding. As states continue to consider methods to fund their surface transportation, they should look to the private sector as a critical ally. 

1 Hartgen, David, M. Gregory Fields, and Elizabeth San Jose. "Are Highways Crumbling? State and U.S. Highway Performance Trends, 1989-2008." 2012.

2 Utt, Ronald D. "Federal Highway Trust Fund: Recommit to Better Highways and Enhanced Mobility." 2010.

3 Poole, Robert W. "Funding Importation Transportation Infrastructure in a Fiscally Constrained Environment." Reason Foundation.

**CARA SULLIVAN** is the director of the American Legislative Exchange Council Task Force on Commerce, Insurance and Economic Development.





# RIGHT-TO-WORK IN MICHIGAN

## *The Untold Story*

BY F. VINCENT VERNUCCIO

In December 2012 something almost inconceivable happened: Michigan became the nation's 24th right-to-work state.

In the birthplace of the United Auto Workers (UAW), the state with the fifth highest union membership in the country gave employees the freedom to choose.

"Right-to-work" simply means that a worker cannot be fired for refusing to support a union. However, this basic concept shows business that the state is willing to put job creators and employees above the special interests. The result is that states with right-to-work laws have lower unemployment, higher population growth, higher wage growth, and when factoring in the cost of living, employees actually make more in right-to-work states.

A near-sighted view of the events that led to the enactment of right-to-work (or "freedom-to-work," as it is called in Michigan) last year would make the process seem simple. Michigan's neighbor, Indiana, went right-to-work in January 2012. That Indiana added 43,300 jobs while Michigan lost 7,300 was a clear message to Michigan's Governor Rick Snyder that

his state was at a competitive disadvantage. As Michigan's unemployment hovered around 9 percent, and after a decade of economic decline, that was a disadvantage the Wolverine State could no longer afford.

Governor Snyder always maintained that if a worker freedom bill came to his desk, he would sign it. However, the governor also stated that right-to-work was "not on his agenda," because he believed the conversation over the issue would be too divisive.

However, Michigan's unions overplayed their hand when they put a constitutional amendment on Michigan's ballot. The amendment, Proposal 2, would have given government unions collective bargaining agreements the power to effectively overrule laws. The



amendment would have also made right-to-work legislatively impossible.

In the end, this political power-play backfired, forcing Michigan to have the conversation about right-to-work. The result was clear and overwhelming: Michigan voters rejected the union-backed Proposal 2 by a margin of 15 points.

Now, with the voters having spoken and (more importantly) with the need to stay competitive with its neighbor, Michigan took on right-to-work and quickly gave employees the freedom to choose. That simple, right?

Not at all. Like an iceberg, the movement to give employees freedom of choice in Michigan had a large foundation that often went unobserved on the surface.

Naming everyone who deserves credit would take more space than is available here. While the Mackinac Center provided intellectual ammunition, groups such as Americans for Prosperity and the Michigan Freedom to Work Committee deployed a large number of grassroots activists. Terry Bowman, president of Union Conservatives and current UAW member, spoke to rally his fellow union members in support of worker freedom.

There were motivated lawmakers pushing the bill, led by two freshmen legislators: Senator Pat Colbeck (SD-7) and Representative Mike Shirkey (HD-65).

Michigan power players such as Dick Devos and Ambassador Ron Weiser bolstered nervous politicians concerned about being targeted by unions in their reelections.

Worried legislators could take comfort in the electoral victories of their neighbor. In the election after Indiana passed right-to-work, the party that supported right-to-work did not lose a single seat in the state Senate and even picked up nine seats in the House.

A number of national groups coalesced to provide logistical support and advice, such as the National Right to Work Committee, Americans for Tax Reform and the State Policy Network.

No single person or group made right-to-work happen in Michigan, but it was an effort of which if one or two of the players were not present, workers in the state still would be forced to pay a union just to keep their job.

However, that analysis also does not fully grasp the entire picture of the careful two-decade long planning that resulted in right-to-work's eventual passage.

For years, the Mackinac Center carefully made the case for how right-to-work would help

Michigan. This planning allowed the center to put out information almost overnight, highlighting prior studies and analyses on the benefits of worker freedom.

The grassroots organizations showed their members over time why they should care about the issue. Donors with political influence held their fire until the time was right. Lawmakers who wanted nothing more than to give their union member constituencies the power to choose kept their powder dry, working to convince their colleagues instead.

All of these pieces were in place and, when the timing was perfect, sprang into action.

But even this is not the full picture. The final component was waiting for the stage to be set. Could right-to-work have happened in 2012 without Proposal 2 or Indiana's passage of right-to-work? Probably not.

Michigan did not have much influence in Indiana; however the concerted effort making the case for worker freedom which resulted in ever increasing support, in conjunction with the governor's labor reforms for government unions is likely what forced the unions to overplay their hand with Proposal 2.

Recently, UAW President Bob King said that the labor reforms enacted around the nation in 2011 and 2012 caused unions to worry about the possibility of right-to-work and without that possibility, he never would have pursued Proposal 2.

In essence, even Proposal 2 was a result of those fighting for labor reform.

Finally, there was messaging. Everyone involved with the right-to-work fight knew the battle would not be won with statistics – which were decidedly in favor of employee freedom, such as employees in right-to-work states make about four percent more when factoring in the cost of living.


The effort needed a clear and convincing message that was understandable to everyone. It had to appeal to a broad base and not simply speak to those who were already predisposed to union reform.

The message had to underline that right-to-work is about helping employees and focus on the positive instead of going negative.

The governor perfectly encapsulated this message when he explained how right-to-work policies lead to more freedom. These policies are “pro-worker,” and result in “more and better jobs” for Michigan employees.

Right-to-work does this because it helps make unions more accountable to their membership and may even make them stronger.

A fact reflected in the most recent statistics from the Department of Labor shows that in 2012 right-to-work states (not counting Indiana or Michigan) added 39,000 union members while forced unionism states lost 390,000.

In the end, Michigan had the perfect storm, but the storm conditions arose from a variety of factors precipitated by two decades of hard work, making the impossible possible. 



**F. VINCENT VERNUCCIO** is Director of Labor Policy at the Mackinac Center for Public Policy in Michigan and Subcommittee Chair of ALEC's Labor and Business Regulation Committee.



## Smart Aid to Africa: An Innovative Approach

BY AVI LESHES AND ED ELEASIAN

During the second half of the twentieth century, many African nations seemed to exchange colonialism for tribal and ethnic rivalry leading to civil war, genocide, famine and the displacement of millions of Africans. The proliferation of disease, including the rapid spread of HIV/AIDS and a series of natural disasters added to the misery. Numerous international organizations increased aid to the region. However, continued violence and territorial struggles impeded these efforts and the chronic challenges the continent faced hindered its progress in establishing the institutions that underpin functional governments and rule of law.

Control over natural resources is the primary driver of tribal and ethnic violence, since gold, diamonds, precious metals and other valuable minerals are the chief means of financial support for insurgents working in opposition to local governments and terrorists and other international criminals. Terrorists routinely avoid having their assets frozen or confiscated by converting them into commodities like diamonds, which more easily cross national borders. Just before 9/11, al-Qaeda converted \$20

million into diamonds and gold obtained in Africa; the 9/11 attacks cost a mere \$500,000. Drug cartels, such as Los Zetas of Mexico, FARC of Colombia and Hezbollah routinely use Africa to expand their operations and resources.

The Kimberley Process (KP), established in 2003 by a United Nations General Assembly resolution, was one proposed remedy. KP is a certification method seeking to ensure diamond buyers that the diamond being purchased is not from a conflict stricken country. Gold, precious gems and other valuable minerals, however, do not fall under KP jurisdiction. And while its objective is laudable, the scheme has enjoyed only moderate success. Rather than eliminating the illicit diamond trade, KP has forced it underground, increasing corruption. Local merchants profit by forging false certification documents that enable conflict diamonds to enter the non-conflict supply chain.

We are all appalled by atrocities committed in Africa and by terrorist and international crime networks in Africa and elsewhere, although we unwittingly support these activities by purchasing commodities like diamonds that are smuggled from conflict zones into neutral markets. Conflict diamonds have begun appearing in China, Dubai, the UAE and

Lebanon – countries which have never historically served as diamond hubs at all. These diamonds are resold into larger markets like London and NYC.

The Royal Miracle Corporation (RMC) is a consortium of New York City diamond merchants that has developed a public-private partnership framework to help reduce the flow of conflict diamonds and promote rule of law in parts of Africa where it is absent. RMC has a plan to improve KP enforcement by changing the way U.S. aid is distributed in Africa. RMC's primary objective is to use American enterprises already engaged in African trade to help the nations of Africa to develop sustainable, consistent income and employment opportunities. These efforts should ultimately lead to adequate educational and health facilities, functional governments and rule of law in the nations targeted.

Too often U.S. aid delivery systems fail the African people and squander US tax dollars. Much aid never reaches its intended recipients, instead ending up in the hands of corrupt political and business leaders as well as terrorists. Instead of sending U.S. aid to governments unwilling and incapable of adequately monitoring how funds are disbursed, RMC proposes to pilot a new distribution network by using U.S. companies, such as RMC or other U.S. companies on the ground in Africa which are uniquely positioned to oversee the dissemination of aid.

Any government contractor receiving funds under RMC's proposal should be subject to a quarterly audit by the relevant government bodies including U.S. Agency for International Development, the Internal Revenue Service, Congress and the Office of Management and Budget. These U.S. companies can and should be prosecuted in a U.S. Court of Law if funds are misappropriated.


RMC also recommends that the U.S. government and its allies provide additional support to African nations that have experienced an increase in smuggling activities to assist in enforcement of the law. This support would weaken the local warlords and dictators who currently control many of the mines. This should provide local governments with the opportunity to certify the commodities that are mined legally, thus establishing legitimate revenue streams. Reinforcing local law enforcement will disrupt the flow of illegal commodities and local governments can team with U.S. enterprises to retake their mines, extract the resources and sell them legally, resulting in the economic opportunities that these countries need to improve governance and grow their economies.

RMC has approached African leaders who have agreed in principle to RMC's public-private partnership proposal and who view it as a way to spur economic opportunity and build much needed infrastructure. RMC is confident in its ability to ensure that U.S. aid is distributed in the manner intended, which will allow the people of Africa to derive the benefits of their continent's resources for themselves. RMC will establish operations in each country in which it operates to guarantee that rules like KP are followed for all commodities extracted. We would suggest that all other U.S. enterprises adopting the plan do the same. Having a local presence gives RMC the oversight capability to ensure that funds are not diverted and that there is sufficient capital to build schools, hospitals, water treatment facilities, electrical capacity, food security and general infrastructure in these developing nations. RMC will work with Congress and other governmental entities to conduct pilot projects to test the program's efficacy. Once tested, the program's ultimate goal is to provide the tools necessary for the targeted African nations to become economically independent. Leaders in several African nations have seen how political

and economic stability can help maintain current foreign investment and attract new investors who want to work in emerging markets and how the foreign investment can boost the tourism industry as well. Angola, Sierra Leone and Zambia are poised for this kind of economic growth and have become the focus of many Asian and European investors. We believe this plan can make the difference between their success and failure.

The benefits to Africans of the successful implementation of the RMC scheme are obvious, but Americans will also benefit. U.S. companies will perform oversight and help with infrastructure projects, creating US jobs, and U.S. diamond and commodities companies will be in a better position to compete globally. RMC and other diamond merchants support this project because it will create a better business environment. As Myron Brilliant, the Senior Vice President for International Affairs of the U.S. Chamber of Commerce observed in the Heritage Foundation's *2013 Index of Economic Freedom*, "Good governance leads to good business." A reliable justice system is an important consideration when deciding to invest in a country as business needs assurance that national governments will abide by decisions rendered by their justice systems. Yet in many parts of Africa, rule of law and appropriate law enforcement are absent, stifling economic opportunity and hindering business growth. The diamond industry acutely suffers the effects of Africa's good governance deficiencies.

At their founding, Singapore and Malaysia worked tirelessly to develop a rule of law model to attract foreign investment. Today both have become major centers of economic growth in the region and while there is still more work to do, Singapore's Freedom House rating improved over the past year while Malaysia's 2012 numerical ratings have not worsened, and Malaysia remains "partly free." It is this model that RMC hopes to replicate in Africa. RMC is confident the creation of a rule of law model will appeal to investors and set the stage for future economic opportunities for Africa.

It is time for U.S. aid to facilitate Africa's ability to create the international trade relationships that can serve as a sustainable economic engine. "Give a man a fish; you have fed him for today. Teach a man to fish; and you have fed him for a lifetime." We need to help Africa lay the foundation for a "lifetime" of economic growth! 



**AVI LESHES**, RMC's Political Liaison, previously worked as the assistant to the Director of Military Programs at the Aleph Institute; served as a specialist in New York Senator Kirsten Gillibrand's office on Military and Veterans Affairs and lived in Singapore for a year, where he researched the factors leading to Singapore's vibrant economy.



**ED ELEASIAN**, a Senior Vice President at RMC, has worked in the jewelry industry since his high school graduation at 15. Within 10 years he became his company's Vice President and was responsible for a 300% revenue increase as well as a number of innovations that cut waste and improved profits. Ed provides solutions for other firms in the trade by providing media and advertising expertise.



# Promoting Fair Share Liability

BY VICTOR E. SCHWARTZ & CARY SILVERMAN

**T**he unfairness of joint and several liability has become increasingly apparent over the past three decades. When joint liability applies, a person who is only minimally at fault may be forced to pay the entire amount of a court judgment, including the portion attributed to the wrongful conduct of others. In other words, a jury's finding that a particular defendant may have been only 10% at fault is overridden and that defendant may be forced to pay 100% of the award if others who share responsibility do not pay their "fair share." A new Council model policy, the *Fair Share Act*, provides a roadmap for reform.

Let's say, for example, you run out of gas on a highway and you have no choice but to leave the car on the side of the road as you walk to the nearest gas station. A drunk driver slams into your car, killing a passenger in his vehicle and injuring another driver who is unable to avoid the wreckage. The drunk driver is uninsured and has little financial resources. Most people would think it is unfair to place the entire amount of the damages from any injuries stemming from the accident on you as the vehicle owner, given that your responsibility was miniscule in comparison to the drunk driver.

Most jurisdictions have moved away from joint liability and adopted a "Fair Share" approach, under which each party is responsible for damages in proportion to its responsibility for the injury. Oklahoma and Pennsylvania are the most recent states to do so. Several states, however, fully retain joint liability or apply joint liability in a wide range of cases. States can improve their civil justice systems by amending their laws to eliminate loopholes, correct judicial misinterpretations, or address confusion in the courts regarding the ability of a jury to allocate fault among all who contributed to an injury.

The purpose of the new model act is simple—establishing that liability is imposed in proportion to responsibility—but complexities and questions may arise as you develop a

proposal that fits the law of your state. The Council stands ready to assist you in understanding the nature and nuances of this model policy.

## THE PUBLIC POLICY BASIS FOR JOINT LIABILITY NO LONGER APPLIES

Joint liability has its origin in a time in which the doctrine of contributory negligence barred a plaintiff that was even partially at fault for his or her own injury from any recovery. When this rule was in place, it was felt that it was fairer for a culpable defendant to bear the loss than to leave a blameless plaintiff without a full recovery.

With the widespread adoption of comparative fault, the principal justification for requiring one defendant to bear another individual or entity's share of fault was lost.<sup>1</sup> In the vast majority of jurisdictions, a plaintiff who is partially to blame for his or her own injury is not barred from recovery, but will have his or her recovery reduced in proportion to that individual's share of responsibility for the harm.

In today's legal environment, in which liability is closely linked with fault, both courts and legal scholars have criticized the continued application of joint liability.<sup>2</sup>

Aside from placing unfair, disproportionate liability on defendants, joint liability encourages plaintiffs' attorneys to engage in "shotgun pleading." Plaintiffs' lawyers know that if they "sue everybody" they are likely to be able to convince the jury to assign at least one percent responsibility to one of the defendants, assuring that at least one party will be available to pay the entirety of a potentially large award.

Joint liability may also encourage plaintiffs' lawyers to target businesses they consider to have "deep pockets" even when those businesses played a small part in the plaintiff's injury, while settling with those who bare the greatest responsibility for a nominal amount.

In addition, joint liability blunts incentives for safety because it allows negligent actors to under-insure and puts full responsibility on those who may have been only marginally at fault.

## THE VAST MAJORITY OF STATES HAVE MOVED AWAY FROM JOINT LIABILITY

Recognizing the need for reform, most states have abolished or limited the application of joint liability through legislation or court decision. These reforms show a clear movement toward equating liability with fault. Significantly, no state that has repealed or modified its joint liability law has ever gone back and amended the law to restore joint liability.

## RECENT ENACTMENT OF JOINT LIABILITY REFORM

As we have indicated, Oklahoma and Pennsylvania are the most recent states to enact joint liability reform.

The Oklahoma experience shows that states can successfully take a step-by-step approach to reducing joint liability. In 2004, Oklahoma moved from full joint liability to a 50% threshold approach, but continued to apply joint liability when it is found that the defendants acted willfully or recklessly, or where the plaintiff had no comparative negligence. Five years later, the Oklahoma legislature eliminated these exceptions, but otherwise retained the 50% threshold approach. Most recently, in 2011, Oklahoma abolished joint liability except where the state brings the lawsuit.<sup>8</sup>

Pennsylvania moved toward several liability on June 28, 2011, when Governor Tom Corbett signed the Fair Share Act into law. The Pennsylvania law is similar to Oklahoma's first step in joint liability reform. Pennsylvania's Fair Share Act eliminates joint liability except where a defendant is responsible for 60% or greater of the total fault apportioned to all parties and in several other limited situations.<sup>9</sup>

Other states that have reformed their joint and several liability laws over the past decade include Arkansas, Florida, Georgia, and Mississippi, which abolished joint liability, Missouri and South Carolina, which limited joint liability to defendants who are found at least 50% responsible for the injury, Ohio, which adopted both a 50% threshold and limited joint liability



## STATE OF THE STATES

### ***Joint Liability:***

Eight states and D.C. retain full joint liability which allows a winning plaintiff to collect the entire judgment from any one of the defendants regardless of their degree of responsibility.<sup>3</sup>

- Half of those states, however, retain contributory negligence as a complete bar to recovery.
- Several other states have generally adopted several liability, but provide broad exceptions in which joint liability continues to apply.<sup>4</sup>

### ***Fair Share Liability:***

19 states have replaced joint liability with several (“fair share”) liability, under which each defendant is liable in proportion to its percentage of responsibility for the harm, or sharply limited joint liability to narrow situations.<sup>5</sup>

### ***Threshold Approach:***

17 states have abolished joint liability for defendants whose degree of fault falls below a specified threshold (e.g., no joint liability for defendants found to be less than 50% at fault), retaining joint liability only for defendants with a major share of the fault for the plaintiff’s harm.<sup>6</sup>

### ***Economic/Noneconomic Distinction:***

Seven states limit joint liability for noneconomic damages, such as pain and suffering, while retaining joint liability for certain economic losses, such as medical expenses or lost wages.<sup>7</sup>

### ***Combination:***

A few states combine these approaches.

to economic damages, and Texas, which clarified its procedures for allocation of fault to non-parties. In addition, West Virginia placed modest limitations on joint liability.<sup>10</sup>

### **CONSIDERATION OF ALL PARTIES**

The area of greatest deviation, ambiguity, and confusion in the states is with respect to a jury’s ability to allocate fault to individuals or entities that are not present at trial, but whose conduct is likely to have contributed to the plaintiff’s injury. This issue arises in states that have otherwise abolished joint liability, modified joint liability to apply only to those whose responsibility for the injury reaches a certain threshold percentage, or enacted other limitations on joint liability.

There are many reasons why a person or company may not be named as a defendant in litigation, even if it contributed to the plaintiff’s injury. A company that shares responsibility for the injury may have gone out of business or may be insolvent. An individual who clearly is largely at fault for the harm may be “judgment proof,” meaning he or she has little or no assets to pay damages. Some people or entities are immune from litigation. For example, states have sovereign immunity, employers’ liability for on-the-job injuries is generally limited to workers’ compensation, and, in some states, charitable organizations have limited liability.

A plaintiff may choose not to sue an individual or entity because it is beyond the jurisdiction of the court or not subject to service of process, such as a foreign company that does little busi-

ness in the United States. As noted earlier, it is common for plaintiffs to settle with those who have little financial resources, even if those parties bear most of the responsibility for the injury. Instead, joint liability encourages plaintiffs’ lawyers to focus their litigation on “deep pockets” and press for major liability exposure on a business that had a minor role in bringing about an alleged harm.

If a jury is only allowed to consider the responsibility of parties that are before the court, the effect is to shift liability on the named defendants for the wrongful conduct of others. Such a result is contrary to the purpose of several liability and, effectively, retains a form of joint liability. As the authoritative treatise on tort law recognizes, “[T]he failure to consider the negligence of all tortfeasors, whether

parties or not, prejudices the joint defendants who are thus required to bear a greater proportion of the plaintiff's loss than is attributable to their fault."<sup>11</sup>

Nevertheless, this issue is subject to a great deal of litigation because some state laws refer to allocation of fault to "parties" or "defendants." Some courts have narrowly interpreted these terms to limit allocation of fault to those who are named as a defendants in the litigation.<sup>12</sup> Some states, such as Illinois, do not even allow the jury to consider the responsibility of settling parties.<sup>13</sup> In other states, judges interpret state law as permitting juries to allocate fault to nonparties.<sup>14</sup> Several states have adopted statutes that explicitly permit the jury to allocate fault to nonparties. Some of these states provide a specific procedure for a defendant to provide notice to the plaintiff of its intention to allocate fault to a nonparty<sup>15</sup> while others do not provide such detail.<sup>16</sup> Finally, in some states, the law on allocation of fault to nonparties may be unclear.

#### THE COUNCIL'S NEW MODEL FAIR SHARE ACT

In January 2013, the Council adopted new model policy addressing this issue, the *Fair Share Act*. The Council has long supported elimination of joint liability and its "*Joint and Several Liability Abolition Act*," approved in 1995, was influential in the states, but the model policy, like an old house, needed to be remodeled to fit the conditions of 2013. The new *Fair Share Act* retains the central feature of the earlier model act: each defendant is liable only for damages in direct proportion to that defendant's responsibility. The *Fair Share Act* incorporates helpful

features of state laws enacted in recent years. It makes clear that juries may allocate fault to any person or entity that shared responsibility for the injury, regardless of whether it is named as a defendant.


The core of the *Fair Share Act* abolishes joint liability and adopts several liability. In allocating responsibility, jurors (or the court in a bench trial) would consider the responsibility of each claimant, defendant, settling party, or nonparty designed by a defendant. A jury's allocation of fault to a nonparty would not bind that person or entity to pay damages and may not be used in any subsequent legal proceeding. The jury allocates responsibility to nonparties only as a way of accurately determining the defendant's liability.

While legislators may choose to adopt a threshold approach, or retain state law providing such an approach, it is essential that legislation explicitly recognize that juries may allocate fault to nonparties regardless of whether the person or entity was or could have been named as a party to the action. Without such a provision, courts may interpret the law to shift liability onto named defendants for the responsibility of those who are not in court.

The *Fair Share Act* includes a specific procedure for designation of nonparties to which the jury may allocate responsibility. The model policy recommends providing notice of an intent to allocate fault to a nonparty by filing a motion no later than 60 days prior to the date of trial or the close of discovery, whichever is closer to trial, to provide fairness to plaintiffs. A person or entity may be designated as a responsible nonparty regardless of whether the person was or could have been named as a party to the

action and irrespective of whether the nonparty is insolvent, immune, or not subject to service of process in the jurisdiction.

States that provide for allocation of fault to nonparties currently vary on how and when such notice is to be given to the plaintiff. If court decisions in your state raise concerns as to whether the legislature may specify a particular procedure for designating nonparties<sup>17</sup>, there are two alternatives: require only that the defendant provide notice of designation of a nonparty before trial in accordance with requirements established by court rule, which is the approach used in Arizona<sup>18</sup>, or do not provide a procedure for designation of nonparties, as is the case in several other states.<sup>19</sup>

Through adoption of legislation based on the *Fair Share Act*, you can ensure that your state's civil justice system follows the basic principle of fairness that liability is imposed in proportion to responsibility. 



**VICTOR E. SCHWARTZ** serves as the private sector co-chair of the Council's Task Force on Civil Justice Task Force and as the chair of Shook, Hardy & Bacon's Public Policy Group. He is also on the Council's Board of Scholars.



**CARY SILVERMAN** is an advisor to the Task Force on Civil Justice and Counsel with the Public Policy Group at Shook, Hardy & Bacon L.L.P. He presented the *Fair Share Act* to the Task Force.

1 See Victor E. Schwartz, *Comparative Negligence* § 1.05[e][3], at 29 (5th ed. 2010).

2 See, e.g., Restatement (Third) of Torts: Apportionment of Liability § 10 cmt. a (2000) (stating "it is difficult to make a compelling argument" for full joint liability).

3 Jurisdictions retaining full joint liability include Alabama, Delaware, District of Columbia, Maine, Maryland, Massachusetts (limited to proportionate share of common liability), North Carolina, Rhode Island, and Virginia.

4 Connecticut, Hawaii, Nevada, New Mexico, Washington, and West Virginia are examples of states with statutes that include broad exceptions in which joint liability continues to apply.

5 States that have largely replaced joint liability with several liability include Alaska, Arizona, Arkansas, Colorado, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Michigan, Mississippi, North Dakota, Oklahoma, Tennessee, Utah, Vermont, and Wyoming.

6 States that have adopted the "threshold approach" include Illinois (25%), Iowa (50%), Minnesota (50%), Missouri (51%), Montana (50%), Nevada (less than plaintiff's fault), New Hampshire (50%), New Jersey (60%), New York (50%), Ohio (50%), Oregon (equal or less than plaintiff or 25%), Pennsylvania (60%), South Carolina (50%), South Dakota (50%), Texas (50%), West Virginia (30%), and Wisconsin (51%). Washington State applies joint liability only when the plaintiff bears no degree of fault and other limited situations.

7 States that have limited joint liability for noneconomic damages, but retained joint liability in some circumstances for economic damages, include California, Hawaii, Illinois, Iowa, Nebraska, New York, and Ohio.

8 S.B. 862 (2011) (codified at Okla. Stat. tit. 23, § 15.1).

9 42 Pa. Cons. Stat. § 7102. The Pennsylvania law also continues to apply joint liability where there is an intentional misrepresentation, an intentional tort, for certain environmental claims, and where there is a violation of the state's dram shop law.

10 The West Virginia law eliminates joint liability for defendants 30% or less at fault. If a claimant has not been paid after six months of the judgment, however, defendants 10% or more responsible are subject to reallocation of uncollected amount. Defendants less than 10% at fault or whose fault is equal to or less than the claimant's percentage of fault are not subject to reallocation. W. Va. Code Ann. § 55-7-23.


- 11 See W. Page Keeton et al., *Prosser & Keeton on the Law of Torts* 475-76 (5th ed. 1984) (emphasis added).
- 12 See, e.g., *Donner v. Kearse*, 662 A.2d 1269 (Conn. 1995); *Baker v. Webb*, 833 S.W.2d 898 (Ky. Ct. App. 1994); *Jensen v. ARA Servs., Inc.*, 736 S.W.2d 374 (Mo. 1987); *Bencivenga v. J.J.A.M.M., Inc.*, 609 A.2d 1299 (N.J. Super Ct., App. Div. 1992); *Bowman v. Barnes*, 282 S.E.2d 613 (W. Va. 1981); *Connar v. West Shore Equip. of Milwaukee, Inc.*, 227 N.W.2d 660 (Wis. 1975); *Board of County Commissioners v. Ridenour*, 623 P.2d 1174 (Wyo. 1981).
- 13 See *Ready v. United/Goeddecke Services, Inc.*, 905 N.E.2d 725 (Ill. 2008).
- 14 See, e.g., *DaFonte v. Up-Right, Inc.*, 828 P.2d 140 (Cal. 1992); *Idaho Dep't of Labor v. Sunset Marts, Inc.*, 91 P.3d 1111 (Idaho 2004); *Brown v. Keill*, 580 P.2d 867 (1978); *Hunter v. General Motors Corp.*, 729 So.2d 1264 (Miss. 1999); *Bode v. Clark Equip. Co.*, 719 P.2d 824 (Okla. 1986).
- 15 See, e.g., *Ariz. Rev. Stat. § 12-2506*; *Colo. Rev. Stat. § 13-21-111.5*; *Fla. Stat. Ann. § 768.81(3)*; *Ga. Code Ann. § 51-12-33*; *Ind. Code Ann. § 34-51-2*; *Mich. Comp. Laws §§ 600.2957, 600.6304*; *Tex. Civ. Prac. & Rem. Code Ann. §§ 33.003, 33.004*; *Utah Code Ann. § 78-27-38(4)(a)*.
- 16 See, e.g., *La. Civ. Code art. 2323(A)*; *N.M. Stat. Ann. § 41-3A-1(B)*; *N.D. Cent. Code § 32-03.2-02*.
- 17 See *Johnson v. Rockwell Automation, Inc.*, 308 S.W.3d 135 (Ark. 2009) (finding that requiring the filing of a pleading by a certain date violates the separation of powers by intruding on court rules).
- 18 *Ariz. Rev. Stat. § 12-2506*.
- 19 Louisiana, New Mexico, and North Dakota are among states that explicitly provide for allocation of fault to nonparties but do not provide a specific procedure for doing so. This approach, however, may also raise the potential for a constitutional challenge as the Montana Supreme Court, in invalidating a law authorizing allocation of fault to nonparties, found that the statute lacked "any kind of procedural safeguard" when compared to laws in other states and "imposed a burden upon plaintiffs to anticipate defendants' attempts to apportion blame [to a nonparty] up to the time of submission of the verdict form to the jury." *Newville v. Department of Family Servs.*, 883 P.2d 793, 802 (Mont. 1994).

## Technology, continued from Page 17...

The establishment of an Enterprise Fraud Program Office is a smart investment and likely to translate into cost savings, ultimately lowering overall spending for the state. In order to keep the Enterprise Fraud Program Office accountable, legislators should set regular reporting requirements for the Office to relay progress and identify anticipated costs and savings to the legislature.

In 2010, states lost an estimated \$67 billion to waste, fraud, and abuse across five major benefit programs.<sup>3</sup> Taxpayers are footing the bill for criminal activity and government programs are becoming less effective. According to current SAS employee and former Michigan Senator and Council state chair, Wayne Kuipers, "Fraud and abuse are unnecessarily draining funds from state coffers and robbing benefits from our neediest citizens. States should be leveraging all of their data assets and deploying the most innovative technologies available to stop these criminals in their tracks."

Identifying how government agencies can cut instances of fraud, waste, abuse, and improper payments will increase government efficiency, transparency, and accountability. It is an important step toward limiting the size and scope of government spending and giving Americans the highest return on their taxpayer dollars.

For more information, please see the American Legislative Exchange Council model policy on detection and prevention of fraud, waste, abuse and improper payments in state government. 

## Fraud, waste, abuse, and improper payments are a widespread and problem for the federal and state governments:

- According to the U.S. Department of Labor, the 2011 Unemployment Insurance Payment Error Rate was 11.2%, resulting in \$5.7 billion of improper payments.<sup>4</sup>
- In the 2012 filing season, IRS estimated losses due to identity theft alone at \$5 billion.<sup>5</sup>
- The Government Accountability Office (GAO) estimates that over \$70 billion in improper payments are made each year in Medicaid and Medicare.<sup>6</sup>



**REPRESENTATIVE JASON SAINE (HD-97)** is the Council State Chairman for North Carolina. He represents North Carolina House District 97.

1 Gruszecki, Debra. "Banking: 2 convicted in \$250 million tax fraud scheme." *The Press-Enterprise*. January 31, 2013.

2 U.S. Department of Health and Human Services. "Medicare Fraud Strike Force Charges 111 Individuals for more than \$225 million in False Billing and Expands Operations to Two Additional Cities." February 17, 2011.

3 SAS. "Fraud, Improper Payments and Non-Compliance." Accessed February 20, 2013. Available at: <http://www.sas.com/industry/government/state/fraud/index.html>

4 "Labor Department Reports on Unemployment Benefits Paid In Error." *Time & Pay - Payroll, Payroll Taxes, HR, ATA, Benefits*. Time & Pay, 26 Sept. 2011.

5 United States Treasury Inspector General for Tax Administration. 19 July 2012.

6 The Indiana Family and Social Services Administration. "Medicaid Program Integrity Commission on State Tax and Financing Policy." October 2012.



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